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<b>K.T., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 10-56</b>
	)	<b>Issued: December 2, 2010</b>
<b>U.S. POSTAL SERVICE, PROCESSING &amp;</b>	)	
<b>DISTRIBUTION CENTER, Wilmington, DE,</b>	)	
<b>Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

On October 7, 2009 appellant, through counsel, filed a timely appeal from the July 24, 2009 merit decision of the Office of Workers' Compensation Programs denying her claim for brachial plexus/neuritis. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

The issue is whether appellant sustained brachial plexus/neuritis in the performance of duty, causally related to factors of her federal employment.

On appeal, appellant, through her attorney, argues that the opinion of the impartial medical examiner was unreasoned and that the Office should have requested clarifying information.

## **FACTUAL HISTORY**

This is the second appeal before the Board. In the first appeal the Board, by decision dated October 23, 2007,<sup>1</sup> remanded the case for further development of the evidence. The Board found that the opinion of Dr. Richard Read, a Board-certified electrophysiologic clinical specialist<sup>2</sup> and the opinions of Dr. Scott M. Fried, an osteopath,<sup>3</sup> while not sufficient to establish appellant's claim, were sufficient to require further development of the evidence. The facts and history of the case as set forth in the October 23, 2007 opinion are hereby incorporated by reference.

On remand, the Office referred appellant to Dr. Wayne J. Altman, a Board-certified orthopedic surgeon, for a second opinion. In a report dated January 9, 2008, Dr. Altman, noting that his examination was consistent with a brachial plexopathy and/or cervical radiculopathy, recommended a complete neurologic evaluation for appellant. He further opined that, although a diagnosis of bilateral brachial plexopathy may be present, there is no work-related causes to support this diagnosis. In a January 9, 2008 update, Dr. Altman opined that appellant was not employable as a mail handler, but she can return to modified duty.

In a letter dated January 14, 2008, counsel stated that, if an impartial examination is found necessary, appellant would like to participate in the selection of the impartial physician.

By decision dated January 31, 2008, the Office denied appellant's claim.

Appellant requested a hearing before an Office hearing representative, which was held on June 24, 2008. At this time, she testified that she had been out of work since September 28, 2005. Appellant noted that she was still having problems in her arms, with some pain going down into her elbow and wrist area and numbness and tingling her left and right hands. She also noted pressure in the back of her neck going down her shoulders. Appellant

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<sup>1</sup> Docket No. 07-1423 (issued October 23, 2007). On January 11, 2006 appellant, then a 41-year-old mail handler, filed an occupational disease claim alleging that her limited-duty work, which required repetitive activities, caused an aggravation of her preexisting neck and shoulder problems resulting in bilateral carpal tunnel syndrome and brachial plexus of the right ulnar and radial nerves. In decisions dated March 3 and November 8, 2006, the Office denied her claim, finding that the medical evidence did not establish that her claimed injury resulted from her job duties.

<sup>2</sup> Dr. Read conducted an electroneuromyographic evaluation of appellant on October 28, 2005 and listed the following impressions: (1) bilateral brachial plexus level neuropathies involving moderately, the right lateral cord and left upper trunks of the upper brachial plexes and the postganglion sensory component of the left lower trunk; (2) mild, right ulnar nerve segmental neuropathy at the elbow level, localized to the infracondylar cubital tunnel segment, normal on the left; and (3) borderline (normal) right radial nerve at the radial tunnel level, normal on the left.

<sup>3</sup> The record contains several reports by Dr. Fried. In a September 28, 2005 report, Dr. Fried noted that appellant had repetitive strain injury with cumulative traumas bilateral upper extremities with median and radial neuropathy; bilateral brachial plexitis status post traction injury left thoracic outlet and herniated disc; status post shoulder capsular injuries postoperative decompression and sympathetically mediated pain syndrome with long thoracic neuritis bilaterally. He stated that there was no doubt a direct correlation between appellant's work activities and initial injury and her complaints.

stated that she was still under the care of Dr. Fried. She testified that her examination by the second opinion physician lasted 10 to 15 minutes.

In further support of her claim, appellant submitted a May 30, 2006 report wherein Dr. Fried reviewed her medical and occupational history. Dr. Fried noted that her activities for the employing establishment “caused repeated and continued insults and aggravations to her existing problems about her neck and upper shoulder and brachial plexus areas.” He opined that these injuries resulted in electromyogram nerve conduction positivity at the brachial plexus and ulnar and radial nerve in the distal forearm, consistent with her clinical complaints. Dr. Fried concluded that there was “no doubt a direct correlation” between appellant’s work activities and initial injury and her ongoing complaints as the repairing mail position required her to continue repetitive activity which prolonged head and neck posturing and caused the new and repeat injury.

By decision dated July 29, 2008, the hearing representative set aside the January 31, 2008 decision and directed the Office to refer appellant for an impartial medical examination due to a conflict in the medical evidence.

Due to the conflict between the opinion of appellant’s attending physician, Dr. Fried, and the second opinion physician, Dr. Altima, with regards to whether appellant was suffering from an upper extremity condition and whether that condition was causally related to her limited-duty job activities as a mail handler, the Office referred appellant to Dr. Michael Wujciak, a Board-certified orthopedic surgeon, for an impartial medical examination. In an opinion dated November 13, 2008, Dr. Wujciak listed his impressions as: (1) status post impingement syndromes of the shoulders bilaterally with evidence of residual impairment and deconditioning; (2) evidence of brachial plexus irritation, left considerably more than the right; evidence of right ulnar nerve irritation; and (3) evidence of significant confounding factors and disability related behavior. In his discussion, he noted that appellant gave a history of significant rear-end collisions in 1995 and 1998 and indicated that within a reasonable degree of certainty that the etiology of appellant’s brachial plexopathy is related to the automobile accidents not the work incidents. Dr. Wujciak noted that work-related activities can be anticipated to exacerbate the condition. He noted that, with regards to appellant’s brachial plexopathy, that its relationship to her job activities or accepted work conditions is not confirmed. Dr. Wujciak stated, “It is likely that her job-related activities and injuries exacerbated the condition but did not cause it, and it is unlikely to have aggravated, precipitated or accelerated this condition.” He further noted, “My determination of exacerbation as above indicates a temporary worsening of the condition without actual permanent aggravation.” Dr. Wujciak concluded that appellant was suffering from an upper extremity condition which was in part causally related to her limited-duty job activities as a mail handler and which part was not. He explained that what was causally related to her accepted condition was her shoulder condition and what is not related, within a reasonable degree of medical certainty, was the conditions of brachial plexus irritation and or/ulnar nerve neuropathy. Dr. Wujciak noted that he found no evidence of carpal tunnel syndrome. He found appellant’s overall capacity to work at medium-light duty.

On November 19, 2008 the Office accepted appellant’s claim for aggravation of impingement syndrome, bilateral shoulders.

By decision dated November 19, 2008, the Office denied appellant's claim for brachial plexopathy/neuritis based on the weight of the opinion of the impartial medical examiner.

By letter dated November 24, 2008, appellant, through her attorney, requested a hearing.

At the hearing held on April 30, 2009, counsel argued that appellant's brachial plexus injury is work related. He asked the hearing representative to make sure that the impartial medical examiner was properly selected, and argued that if he was not his report did not carry special weight. Counsel also argued that the Office should have sought clarifying information from Dr. Wujciak.

In a July 24, 2009 report, the hearing representative affirmed the Office's November 19, 2008 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>4</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related the employment factors identified by the claimant.<sup>5</sup>

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.<sup>6</sup>

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<sup>4</sup> *J.E.*, 59 ECAB 119 (2007).

<sup>5</sup> *D.I.*, 59 ECAB 157 (2007); *Roy L. Humphrey*, 57 ECAB 238 (2005).

<sup>6</sup> *I.J.*, 59 ECAB 408 (2008).

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an evaluation.<sup>7</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is properly referred to an impartial medical specifically for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background, must be given special weight.<sup>8</sup> When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.<sup>9</sup>

### ANALYSIS

Before turning to the merits of this case, the Board will address the procedural issue regarding the selection of the impartial medical examiner, Dr. Wujciak. The Board notes that, at the hearing, counsel disputed the impartial medical examiner's selection as improper. Under its procedures, the Office is to assure the impartial medical specialist is selected in conformance with the physician's directory system (PDS) from those Board-certified specialists who are qualified and available to conduct the examination.<sup>10</sup> The procedure manual provides that the case file is to be supplemented with documentation of those instances in which a physician was contacted and declined the referral or examination was not otherwise feasible.<sup>11</sup> The Office is to document in the case record how the rotational procedures were followed.<sup>12</sup> In this case, it provided a bypass screen which indicated that one physician, Dr. David Griefinger, a Board-certified orthopedic surgeon, was not chosen because he did not have a timely appointment available. Accordingly, the Office moved on and chose Dr. Wujciak. Appellant did not provide any evidence supporting her assertion made below that Dr. Wujciak was not properly selected. Therefore, there is no evidence that the use of Dr. Wujciak's medical opinion would undermine

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<sup>7</sup> 5 U.S.C. § 8123(a).

<sup>8</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James R. Roberts*, 31 ECAB 1010, 1021 (1980).

<sup>9</sup> *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

<sup>10</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (May 2003). The Physician's Directory System (PDS) is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations. *Id.* at Chapter 3.500.7. The PDS database of physicians is based in large part on the Directory of Medical Specialists compiled by the American Board of Medical Specialties. The PDS contains the names of physicians who are Board-certified in certain specialties as recognized by the American Medical Association. The PDS database also includes Board-certified osteopathic physicians recognized by the American Osteopathic Association. *Id.* See also *R.B.*, 61 ECAB \_\_\_\_ (Docket No. 09-1786, issued July 1, 2010).

<sup>11</sup> *Id.* at Chapter 3.500.4(b)(7).

<sup>12</sup> *D.F.*, 61 ECAB \_\_\_\_ (Docket No. 09-1463, issued August 12, 2010).

the appearance of impartiality or compromise the integrity of the system for selecting impartial medical specialists.<sup>13</sup>

With regards to the merits, the Office accepted appellant's claim for aggravation of impingement syndrome and bilateral shoulders. The issue to be resolved is whether appellant has established her claim for brachial plexus/neuritis. The Office, in denying her claim for this condition, relied on the opinion of the impartial medical examiner, Dr. Wujciak, who stated that appellant's brachial plexus irritation and/or ulnar nerve neuropathy was not related to her employment. However, he also indicated in his opinion that appellant's job-related activities exacerbated her condition without actual permanent aggravation. Where employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the period of disability related to the aggravation.<sup>14</sup> As the opinion of Dr. Wujciak is unclear with regard to whether an aggravation of appellant's brachial plexus irritation and/or ulnar nerve neuropathy were related to his employment activities, and if so, the period of the aggravation, the Board will remand the case for the Office to seek clarification from Dr. Wujciak.

Accordingly, the Board remands this case for the Office to seek clarification of the medical opinion of the impartial medical examiner, Dr. Wujciak. After such further development as the Office deems necessary, it should issue an appropriate decision.

### **CONCLUSION**

The Board finds that this case is not in posture for decision due to an unresolved conflict in medical opinion.

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<sup>13</sup> *Compare D.A.*, 61 ECAB \_\_\_\_ (Docket No. 09-936, issued January 13, 2010) (the evidence supported appellant's contentions that the Office did not follow its procedures in selecting an impartial specialist where there were no notes from the PDS explaining the referral to the designated physician and where it appeared that another physician was actually selected to perform the examination).

<sup>14</sup> *B.K.*, 60 ECAB \_\_ (Docket No. 08-2002, issued June 16, 2009).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 24, 2009 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 2, 2010  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board